

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KAREN SHOATE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,562
<b>GRAPHICS SYSTEMS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>FREMONT COMPENSATION</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the May 10, 2001 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on November 13, 2001.

**APPEARANCES**

Stephen J. Jones of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Appeals Board (Board) considered the record and adopts the stipulations listed in the Award.

**ISSUES**

This claim is for an August 6, 1999 accidental injury to claimant's back which resulted in claimant undergoing her third back surgery including fusion and instrumentation. Work restrictions were recommended which prevented claimant from returning to her regular job. But, because respondent terminated claimant for cause from an accommodated job, Judge Frobish determined claimant was not eligible for a work disability. Instead, claimant's permanent partial disability award was limited to her percentage of functional impairment. The only functional impairment rating provided was by Dr. Pedro A. Murati. Applying the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment as required by K.S.A. 44-510e(a), Dr. Murati assessed claimant's impairment as 25 percent to the body as a whole. However, under the same edition of the Guides, Dr. Murati stated that claimant's preexisting impairment was likewise 25 percent. Furthermore, claimant had a prior work

related back injury which had settled based upon a 27 percent permanent partial general disability. Applying the reduction mandated by K.S.A. 44-501(c), Judge Frobish ruled that claimant was not entitled to any permanent partial disability compensation for this work related injury.

Claimant argues she is permanently and totally disabled as a result of her work related injury. In the alternative, claimant contends that she was terminated in bad faith and is entitled to an award based on a work disability. Claimant also contends the ALJ erred by considering certain surveillance videotapes. During oral argument to the Board, claimant clarified that her objection goes to the foundation for those exhibits.<sup>1</sup>

Conversely, respondent contends that the ALJ's Award should be affirmed in all respects. Respondent argues claimant was terminated for excessive absenteeism not associated with her work related back injury and not the result of bad faith on the part of the respondent. Accordingly, respondent argues claimant is not entitled to a work disability award because she would have remained employed by respondent earning a comparable wage had she not been terminated for violation of respondent's personnel and attendance policies. Respondent argues that claimant was terminated for cause and any permanent partial disability benefits are therefore limited to her permanent functional impairment and requests the Board to affirm the ALJ's Award.

The nature and extent of claimant's disability and the admissibility of the surveillance videotapes are the only issues for Board review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the parties' oral arguments, the Board makes the following findings and conclusions:

The ALJ's Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order. The only disagreement the Board has with the ALJ's analysis is his reliance on the prior workers compensation award as proof of claimant's preexisting condition for purposes of K.S.A. 44-501(c). That statute requires that the award of permanent partial disability compensation "be reduced by the amount of functional impairment determined to be preexisting." The claimant's prior 27 percent permanent partial disability award was entered as a result of a settlement. The record does not establish how that percentage was arrived at nor whether it was intended to also compensate claimant for the closure of any other benefits or issues, such as future medical benefits and the right to review and modification. Furthermore, that settlement was for a 1992 injury. At that time functional impairment was not required to be established by a reliance on the Fourth Edition of the AMA Guides nor was it required to be based upon any edition of the

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<sup>1</sup> Exhibits 1 & 2 to March 19, 2001 Depo. of Lance Foster.

Guides. In this case, the better evidence is Dr. Murati's testimony concerning claimant's preexisting impairment because Dr. Murati based his opinion on the Fourth Edition of the AMA Guides. By utilizing an impairment rating for claimant's preexisting impairment that is based upon the same edition of the AMA Guides as the rating for claimant's present impairment of function, the fact finder is comparing "apples to apples". Therefore, except as to the ALJ's determination of claimant's preexisting condition, the Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

Claimant injured her low back on August 6, 1999 while working for the respondent. Respondent provided medical treatment for claimant's low back injury with several physicians, including orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster first saw claimant on August 11, 1999. Dr. Eyster released claimant to light duty work on August 18, 1999 with restrictions of no lifting over 10 pounds, no repetitive lifting over 5 pounds and no bending over 5 times an hour. Respondent returned claimant to an accommodated job in pick and peel which was within those restrictions but claimant made little effort to perform that job. While still under medical treatment, respondent terminated claimant for violations of its personnel and attendance policies.

Claimant's attendance problems were not only due to her August 6, 1999 work injury. She had other medical conditions that caused her to miss work during this time period as well. But her termination was not due to her excused absences for those other health problems.

At the time of her January 2, 2001 regular hearing testimony, claimant was working 20 to 30 hours per week at a Braum's store "mostly cooking hamburgers, kind of like dishing ice cream and running a cash register."<sup>2</sup> At her March 2, 2001 deposition, claimant said she was considered full time at Braum's, working 35 to 40 hours a week.<sup>3</sup> The Board finds claimant is not completely and permanently incapable of engaging in substantial and gainful employment.<sup>4</sup>

As to her termination, the record includes claimant's testimony, the testimony of Todd Bailey, manufacturing manager for respondent, and the testimony of Debbie Aceto who was respondent's human resource manager at the time of claimant's termination, but was no longer an employee of respondent when she testified. All three testified concerning the facts leading up to claimant's termination. Based in part upon the claimant's lack of credibility, the Board finds the greater weight of the evidence establishes that claimant's termination was not wrongful nor done in bad faith.

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<sup>2</sup> Tr. of Regular Hearing at 22.

<sup>3</sup> March 2, 2001 Depo. of Karen L. Shoate at 35.

<sup>4</sup> K.S.A. 44-510c(a)(2).

The claimant argues that even though she was terminated for cause from an accommodated job that was within her restrictions, she remains entitled to a work disability because she was unable to perform the accommodated job. Furthermore, claimant contends her termination was not in good faith. In support of this argument is the Guerrero<sup>5</sup> case. In that case the claimant made a good faith effort to perform an accommodated job that was within her restrictions but which caused her pain. She was terminated but was still eligible to receive a work disability award. Also, in Niesz<sup>6</sup> the Court found that where a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. "Once the accommodated job ends, the presumption of no work disability may be rebutted."<sup>7</sup>

The Board agrees that the test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.<sup>8</sup> In this case, claimant was terminated primarily for violating respondent's attendance policy. Although claimant disputes the reasonableness of the termination, the Board finds the record fails to establish that the termination was made because of claimant's work related injuries or in bad faith. In fact, the Board finds claimant failed to make a good faith effort to perform the accommodated job and failed to act in good faith when she accrued absences knowing that respondent would accommodate her restrictions and limitations. Claimant's lack of credibility is a factor in this determination. The Board concludes claimant's repeated attendance problems were a violation of the policy considerations announced in Foulk<sup>9</sup> and Copeland.<sup>10</sup> Claimant's conduct was tantamount to a refusal to perform appropriate work as in Foulk or a failure to make a good faith effort to find appropriate employment as described in Copeland. Accordingly, because claimant was terminated for misconduct, the wage she was earning and would have continued to earn had she continued working for respondent should be imputed to her. As this was at least 90 percent of her

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<sup>5</sup> Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

<sup>6</sup> Niesz v. Bill's Dollar Stores, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

<sup>7</sup> Niesz at Syl. ¶ 2.

<sup>8</sup> See Helmstetter v. Midwest Grain Products, Inc., \_\_\_ Kan. App.2d \_\_\_, 18 P.3d 987 (2001) and Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

<sup>9</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>10</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

average weekly wage, her permanent partial general disability award is based upon her permanent functional impairment.<sup>11</sup>

The Board acknowledges that it seems unjust to deny permanent partial disability compensation to a claimant that suffered a work related injury which clearly aggravated her preexisting back condition, worsened her symptoms, caused her to undergo yet another surgery and resulted in increased work restrictions. Nevertheless, the Board is convinced that under the unusual facts of this case this is what the law requires. Claimant is not entitled to a work disability because she was terminated for cause from an accommodated job which was within her restrictions. In addition, the evidence shows that respondent would have further accommodated claimant if necessary. As to her functional impairment, claimant failed to prove any increase beyond the percentage of functional impairment that preexisted this work related injury.

Finally, the Board finds the foundational testimony by Lance Foster and by claimant herself is sufficient to ensure the reliability of the surveillance videotapes. Accordingly, Exhibits 1 and 2 to the Lance Foster deposition are admitted into the record.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated May 10, 2001, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2001.

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BOARD MEMBER

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<sup>11</sup> See Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (1999).

c:     Stephen J. Jones, Attorney for Claimant  
        Christopher J. McCurdy, Attorney for Respondent  
        Jon L. Frobish, Administrative Law Judge  
        Philip S. Harness, Workers Compensation Director